STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
ROBIN STEWART,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2005CA0309
	)	EEOC NO(S): 21BA42826
and	)	ALS NO(S): 07-277
	)	
ADVANCE PCS d/b/a CAREMARK,	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8b-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 23rd day of August 2010

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
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ROBIN STEWART,	)	
	)	**Charge No. 2005CA0309**
Complainant,	)	**EEOC No. 21BA42826**
	)	**ALS No. 07-277**
and	)	
	)	
ADVANCE PCS	)	
D/B/A CAREMARK[1],	)	
	)	**Judge Reva S. Bauch**
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before the Commission on Respondent's Motion for Summary Decision ("Motion"). Respondent's Motion was accompanied by a Memorandum of Facts and Law, as well as 32 Exhibits, supporting Respondent's Motion. Complainant filed a document entitled "Complainant's Motion for Summary Decision" which is actually her response to Respondent's Motion and will be treated as such. Respondent filed a Reply. Respondent also filed a supplemental filing of the original affidavit of John Whitaker (Respondent's Exhibit 4). Complainant also filed a Reply. Respondent then filed a Sur-Reply. Accordingly, this matter is now ripe for a decision.

The Illinois Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

Findings of Fact

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant. Facts not stated herein are not deemed material.

1. On August 5, 2004, Complainant filed a Charge alleging age and race discrimination, as well as constructive discharge.

2. On April 13, 2007, Complainant filed a Complaint, *pro se*, incorporating the Charge.

3. Complainant is a black female, who was 45 at the time of the alleged discrimination.

4. In November 2001, Karen Fiedler hired Complainant for an administrative position.

5. Complainant's duties included providing clerical and administrative support to approximately ten persons.

6. Fiedler was Complainant's direct supervisor.

7. Fiedler gave Complainant excellent performance ratings in May 2002 and May 2003.

8. In July 2002, Fiedler awarded Complainant a 4% merit increase and a $1000 bonus.

9. In or around July 2003, Fiedler awarded Complainant a similar increase and bonus.

10. In the later part of 2003, Complainant's work performance began to decline.

11. Complainant failed to meet project deadlines.

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[1] The correct name for Respondent is ADVANCE PCS d/b/a CAREMARK

12. Complainant failed to notify Fiedler that she would be missing deadlines.

13. Complainant failed to follow-up on customer emails during her supervisor's vacations (even thought Fiedler specifically requested the follow up).

14. Complainant missed business planning deadlines and submitted incomplete assignments.

15. On October 30, 2003, Fiedler met with Complainant to discuss her concerns regarding Complainant's work performance.

16. Fiedler again met with Complainant on November 24, 2003, to discuss her poor performance.

17. In late November, after the November 24, 2003 meeting, Complainant sent an email to Fiedler admitting that she made significant errors regarding missing deadlines, incomplete assignments, and failing to answer customer emails.

18. There was an incident in February 2004 that caused Fiedler to miss a meeting with her boss, Scott Bond.

19. After the February 2004 incident, Complainant was given a first written warning.

20. A week after receiving her first warning, Complainant worked overtime without obtaining prior permission.

21. Respondent had a company policy of requiring employees to obtain prior permission from the employee's supervisor to work overtime.

22. Respondent's policy states that working overtime without authorization may result in discharge without further written warning.

23. On January 12, 2004, Fiedler had told Complainant that she would have to have pre-authorization from her to do any overtime.

24. On February 18, 2004, Fiedler met with Complainant to inform her that she would be receiving a second warning because of her failure to obtain prior consent to work overtime on February 16th and February 17th.

25. Complainant became insubordinate.

26. Fiedler decided to change the warning from a second written warning to a final written warning.

27. Complainant received a final written warning regarding the overtime incident.

28. Following each of the written warnings, Complainant filed an internal complaint with the ECHO department.

29. The ECHO department forwarded Complainant's complaints to Brad Holliday, Assistant Vice President of Human Resources.

30. On April 5, 2004, Complainant wrote a letter to Brad Holliday regarding the two written warnings.

31. Complainant also complained to Brad Holliday about the manner in which Fiedler spoke to her.

32. Complainant also advised Holliday that in the past she had worked overtime without obtaining prior approval from Fiedler, and without even reporting the extra hours for pay purposes.

33. Holiday conducted an investigation and concluded that Fiedler had issued the written warnings in accordance with company policy.

34. Complainant's complaint to the ECHO department, as well as her letter to Holliday, and her conversation with Holliday, failed to indicate that Fiedler issued warnings to her because of race or age.

35. Laurel Bowen, another Administrative Assistant in a similar position to Complainant, committed many mistakes.

36. Laurel Bowen had poorer work performance ratings than Complainant.

37. Laurel Bowen had been placed on a Performance Improvement Plan.

38. Laurel Bowen received lower salary increases than Complainant.

39. Laurel Bowen received smaller bonus payments than Complainant.

40. Laurel Bowen received more written warnings than Complainant.

41. Respondent discharged Bowen due to poor performance and attitude on October 18, 2002.

42. Complainant believes that on April 13, 2004, her purse was searched by Fiedler and Spencer, and a copy of her correspondence with Holiday was removed, copied and returned.

43. On May 28, 2004, Complainant wrote an email to Holiday regarding the purse incident.

44. Complainant told Holliday there were no witnesses to the purse incident.

45. On June 25, 2004, Complainant resigned from her position.

46. At the time Complainant resigned, she did not believe that Fiedler was going to discharge her.

47. Fiedler never made any inappropriate remarks, jokes or comments regarding Complainant's age or race.

48. Fiedler did not ever say anything to suggest that her actions toward Complainant were motivated by Complainant's age or race.

49. Complainant did not complain to Respondent about any alleged age or race discrimination at any time before or after her resignation.

Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Illinois Human Rights Act ("Act"), 775 ILCS 5/1-103(B) and 5/2-101(B).

2. Commission has jurisdiction over the parties and the subject matter of this action.

3. Complainant failed to establish a *prima facie* case for race discrimination.

4. Complainant failed to establish a *prima facie* case for age discrimination.

5. Complainant failed to establish a *prima facie* case for constructive discharge.

6. Respondent has articulated a legitimate, nondiscriminatory reason for terminating Complainant.

7. Complainant has failed to show that Respondent's reason is a pretext for age or race discrimination.

Discussion

I. Standards for Summary Decision

Under Section 8-106.1 of Act, either party to a complaint may move for summary decision. **775 ILCS 5/8-106.1**. *See also* **86 Ill. Admin. Code §5300.735.** A summary decision is the administrative agency procedural analog to the motion for summary judgment in the Code of Civil Procedure. **Cano v. Village of Dolton, 250 Ill App3d 130 (1993).** Such a motion should be granted when there is no genuine issue of material fact and the undisputed facts entitle the moving party to a recommended order in its favor as a matter of law. **Fitzpatrick v. Human Rights Comm'n, 267 Ill App3d 386 (1994).** The purpose of a summary judgment is not to be a substitute for trial but, rather, to determine whether a triable issue of fact exists. **Herrschner v. Xttrium Lab. Inc., 26 Ill App3d (1969).** All pleadings, depositions, affidavits, interrogatories and admissions must be strictly construed against the moving party and liberally construed against the nonmoving party. **Kolakowski v. Voris, 76 Ill App3d 453 (1979).** If the facts are not in dispute, inferences may be drawn from undisputed facts to determine if the movant is entitled to judgment as a matter of law. **Turner v. Roesner, 193 Ill App3d 482 (1990).** Where the facts are susceptible to two or more inferences, reasonable inferences must be drawn in favor of the nonmoving party. **Purdy County of Illinois v. Transportation Insurance Co., Inc., 209 Ill App3d 519 (1991).** Although not required to prove his/her case as if at hearing, a nonmoving party must provide *some* factual basis for denying the motion. **Birck v. City of Quincy, 241 Ill App3d 119 (1993).** Only evidentiary facts, and not mere conclusions of law, should be considered. **Chevrie v. Gruesen, 208 Ill App3d**

881 (1991). If a respondent supplies sworn facts that, if uncontradicted, warrant judgment in its favor as a matter of law, a complainant may not rest on his/her pleadings to create a genuine issue of material fact. **Fitzpatrick at 392.** Where the moving party's affidavits stand uncontradicted, the facts contained therein must be accepted as true and, therefore, the failure to oppose a summary judgment motion supported by affidavits by filing counter-affidavits in response is frequently fatal. **Rotzoll v. Overhead Door Corp., 289 Ill App3d 410 (1997).** Summary decision is a drastic means of resolving litigation and should be granted only if the right of the movant to judgment is clear and free from doubt. **Purtill v. Hess, 111 Ill2d 229 (1986).**

II. Analysis

There are two main methods to prove an employment discrimination case, direct and indirect. Either one or both may be used. **Sola v. Human Rights Comm'n, 316 Ill App3d 528 (2000).** Since there is no direct evidence in this case, the indirect analysis will be used. The method of proving a charge of discrimination through indirect means was described in the U.S. Supreme Court case of **McDonnell Douglas Corp. v. Green, 411 US 792 (1973)**, and is well-established.

First, the Complainant must establish a *prima facie* showing of discrimination against her by Respondent. If she does, Respondent must articulate a legitimate, non-discriminatory reason for its actions. If this is done, the Complainant must prove by a preponderance of the evidence that the articulated reason advanced by the Respondent is a pretext. *See* **Texas Dep't. of Community Affairs v. Burdine, 450 US 248, 254-55 (1981).** This method of proof has been adopted by the Commission and approved by the Illinois Supreme Court. **Zaderaka v. Human Rights Comm'n, 131 Ill2d 172 (1989).**

The issues in this case revolve around race and age discrimination, and constructive discharge. In general, to establish a *prima facie* case for race or age discrimination, Complainant must prove: (1) she is in a protected class; (2) she was

meeting Respondent's legitimate performance expectations; (3) Respondent took an adverse action against her; and (4) similarly situated employees outside Complainant's protected class were treated more favorably. *See* **Interstate Material Corp. v. Human Rights Comm'n, 274 Ill App3d 1014 (1995)** (*prima facie* case for race); **Clyde v. Human Rights Comm'n, 206 Ill App3d 283 (1990)** (*prima facie* case for age).

Race and Age Discrimination Claims

Regarding the race and age claims, I find that Complainant has failed to establish a *prima facie* case. In particular, Complainant fails to show that a similarly-situated employee outside of her protected class was treated more favorably than her. Respondent submitted affidavits from Fiedler and Whitaker, as well as the personnel record of Laurel Bowen that indicate that Lauren Bowen, Complainant's comparative, was treated less favorably than Complainant. Bowen's work file indicates Bowen received lower performance rating than Complainant, lower salary increases than Complainant, and lower bonus payments than Complainant. In addition, Bowen received more written warnings than Complainant. Most importantly, Respondent discharged Bowen because of her poor performance and attitude.

Complainant has failed to submit affidavits or other evidence refuting the facts indicating that Bowen was treated less favorably. Complainant simply makes unsupported statements of her observations regarding Respondent's tolerance for Bowen's mistakes and poor performance. This is insufficient.

Whether or not Complainant has demonstrated that she can establish a *prima facie* case, however, is not fatal. In its submissions, Respondent articulated a legitimate, non-discriminatory reason for its actions. Once such a reason is articulated, there is no need for a *prima facie* case. Instead, at that point, the decisive issue in the case becomes whether the articulated reason is pretextual. ***Clyde and Caterpillar, Inc.*, 52**

Ill. HRC Rep. 8 (1989), *aff'd sub nom* ***Clyde v. Human Rights Comm'n*****, 206 Ill App3d 283 (1990).**

Respondent's submissions are replete with facts, and inferences, supporting its contention that Complainant was reprimanded because she (1) was not performing her job well; (2) she had made a scheduling mistake on her direct supervisor's calendar; (3) she had failed to get pre-authorization for overtime in contravention of Respondent's policy; and (4) she was insubordinate. Respondent's exhibits, including affidavits, Complainant's answers to interrogatories and Complainant's deposition testimony support its articulated reasons for reprimanding Complainant. The submissions indicate that (1) Fiedler did not make any inappropriate statements, comments, jokes, etc. regarding Complainant's age or race; and (2) Fiedler did not do or say anything to suggest that her actions toward Complainant were in any way motivated by Complainant's age or race. In addition, even when Complainant raised her concerns regarding the warnings and her treatment with Holliday, she never mentioned anything regarding race or age discrimination.

Complainant argues that the reasons articulated by Respondent are simply wrong, as the circumstances under which the situations occurred (the scheduling issue and the overtime issue) did not occur the way Respondent contends they did. Simply making these statements in her response is not sufficient to show pretext and overcome the Motion. Although not required to prove her case as if at hearing, Complainant must provide *some* factual basis for denying the motion. ***Supra,* Birck at 123.** In her response, Complainant provides no evidentiary facts for the Commission to consider. Respondent submitted 32 Exhibits to support its position, including affidavits and answers to interrogatories, as well as deposition transcripts. Complainant failed to contradict these facts with counter affidavits or other proper documentation. This can often be fatal. ***Supra*, Rotzoll at 7**. Complainant may not rest on her pleadings once

Respondent supplies sworn facts warranting a decision in its favor. In addition, because Respondent's affidavits stand uncontradicted, the Commission must accept, as true, the facts contained therein. ***Id* at 416.** *See* ***Supra*, Cano at 139** (if the party seeking summary judgment supplied facts *via* affidavit, which, when left uncontradicted, would warrant judgment in its favor as a matter of law, the opponent may not sit idly by and rely on his pleadings to create a genuine issue of factual issue); *see also* **Estate of Budis Andernovics, 197 Ill2d 500, 508 Fn. 2 (2001)** (allegations of a verified complaint do not constitute evidence, except by way of admission, and can be of no assistance in proving a plaintiff's case).

Constructive Discharge Claim

A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced to resign involuntarily. **Steele v. Illinois Human Rights Comm'n, 160 Ill App3d 577 (1987).** When alleging constructive discharge due to race or age discrimination, Complainant must prove that she was compelled to resign because her working conditions were made intolerable in a discriminatory way. **Hill and Wal-Mart Stores**, IHRC, 6247(S), Mar. 1, 1996. Thus, to successfully connect a constructive discharge claim to race or age discrimination, Complainant must first establish a *prima facie* case for race or age discrimination.

Since I find Complainant has failed to demonstrate a *prima facie* case for race or age discrimination, she cannot establish a constructive discharge case. In addition, I find that Complainant has provided no evidence to suggest that the work environment was intolerable as to warrant her to quit. In fact, Complainant admitted that when she resigned, she did not believe she was going to be discharged.

Recommendation

Based on the foregoing, there is no genuine issue of material fact. Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, I recommend that the Complaint be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____

REVA S. BAUCH
DEPUTY ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: August 5, 2009